

A Hong Kim Sime v Malayan Banking Bhd

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-17 OF 1996 (S)

CHONG SIEW FAI CJ (SABAH & SARAWAK), EDGAR JOSEPH JR AND MOHAMED DZAIDDIN FCJJ

B 26 MAY 1999

Bankruptcy — Petition — Affidavit verifying petition sworn by justice of peace — Whether justice of peace in Sabah is competent to attest affidavit in bankruptcy petition having regard to s 128(a) of Bankruptcy Act 1967 and the related legislations — Interpretation Acts 1948 and 1967 s 3 — Subordinate Courts Act 1948 s 79(2) — Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990 reg 2

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The issue was whether a justice of the peace in Sabah is competent to attest an affidavit in bankruptcy petition having regard to s 128(a) of the Bankruptcy Act 1967 ('the Act') and the related legislations. Both High Court (see [1994] 3 MLJ 261) and the Court of Appeal (see [1996] 3 MLJ 449) had agreed that a justice of the peace in Sabah, being clothed with the power to administer oaths under s 128(a) of the Act was competent to attest the affidavit verifying the bankruptcy petition. The judgment debtor appealed to the Federal Court. Counsel for the judgment debtor argued that a justice of the peace in Sabah could not be equated to a magistrate under s 128(a) of the Bankruptcy Act and did not come under the deeming provisions of reg 2 of the Subordinate (Powers of Justices of the Peace) (Sabah) Regulations 1990.

Held, dismissing the appeal with costs:

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Reading s 128(a) of the Bankruptcy Act together with the meaning of the word 'magistrate' as defined in s 3 of the Interpretation Acts 1948 and 1967, s 79(2) of the Subordinate Courts Act 1948 and reg 2 of the Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990, a justice of the peace in Sabah is competent to attest an affidavit in bankruptcy petition, more particularly, an affidavit verifying a bankruptcy petition (see p 261E-F).

[Bahasa Malaysia summary]

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Isu adalah sama ada jaksa pendamai di Sabah adalah kompeten untuk mengakusaksi suatu affidavit dalam petisyen kebangkrutan dengan mengambil kira s 128(a) Akta Kebankrutan 1967 ('Akta tersebut') dan juga perundangan-perundangan berkaitan. Kedua-dua Mahkamah Tinggi (lihat [1994] 3 MLJ 261) dan juga Mahkamah Rayuan (lihat [1996] 3 MLJ 449) telah bersetuju bahawa seorang jaksa pendamai di Sabah, yang mempunyai kuasa untuk mengakusaksi sumpah di bawah s 128(a) Akta tersebut adalah kompeten untuk mengakusaksi affidavit mengesahkan petisyen kebangkrutan tersebut. Penghutang penghakiman telah merayu ke

Mahkamah Persekutuan. Peguam untuk penghutang penghakiman telah berhujah bahawa jaksa pendamai di Sabah tidak boleh disamakan dengan seorang majistret di bawah s 128(a) Akta Kebankrapan dan tidak terjatuh di bawah peruntukan-peruntukan k 2 Kaedah-Kaedah Mahkamah Rendah (Kuasa Jaksa Pendamai) (Sabah) 1990.

Diputuskan, menolak rayuan dengan kos:

Dengan membaca s 128(a) Akta Kebankrapan bersama-sama dengan maksud 'majistret' seperti yang didefinisikan di dalam s 3 Akta-Akta Penafsiran 1948 dan 1967, s 79(2) Akta Mahkamah Rendah 1948 dan k 2 Kaedah-Kaedah Mahkamah Rendah (Kuasa Jaksa Pendamai) (Sabah) 1990, seorang jaksa pendamai di Sabah adalah kompeten untuk mengakusahkan affidavit di dalam petisyen kebangkrapan, lebih khususnya, suatu afidafit menentu-sahkan petisyen kebangkrapan (lihat ms 261E-F).]

Notes

For cases on affidavit in a bankruptcy proceeding generally, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1859-1866.

Legislation referred to

Bankruptcy Act 1967 s 128(a)

Bankruptcy Rules 1969 r 117

Justices of the Peace Ordinance 1961 s 4(1)

Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990 reg 2

Subordinate Courts Act 1948 ss 78, 79, 79(2), 99(2)

Interpretation Acts 1948 and 1967 s 3

Lim Pitt Kong (PK Lim & Co) for the appellant.

Lucy Lo Soo Fun (Hiew & Chin) for the respondent.

Chong Siew Fai CJ (Sabah and Sarawak) (delivering judgment of the court): This appeal concerns only one question respecting which leave to appeal to this court was granted on 12 November 1996. The question is: Whether a justice of the peace in Sabah is competent to attest an affidavit in bankruptcy petition having regard to s 128(a) of the Bankruptcy Act 1967 and the related legislations. In the instant case under appeal, the affidavit is one verifying a bankruptcy petition.

Two other appeals are on the same issue, ie Appeal No 02-18-1996 (S) (between Goh Bun Kwee and Malayan Banking Bhd), and Appeal No 02-19-1996 (S) (between Yee Pak Kui and Malayan Banking Bhd). It has been agreed by all parties through their counsel that the decision in this appeal shall be binding upon those two appeals.

A *Background facts*

Narration of the facts in this appeal would have to start with the respondent's/petitioning creditor's bankruptcy petition because, save for the verifying affidavit made on 2 November 1993, the appeal record does not include any document made or filed earlier than the date of the said petition. On 4 November 1993, the petitioning creditor presented a bankruptcy petition against the judgment debtor Hong Kim Sime (appellant) in the High Court in Tawau, Sabah, for failing to comply with a bankruptcy notice dated 1 March 1993 requiring the judgment debtor to pay a total sum of RM422,976.86 (made up of a judgment sum, interest and costs) by 11 May 1993. The petition was verified by the affidavit attested by a justice of the peace in Sabah.

By a notice dated 24 June 1994 taken out under r 117 of the Bankruptcy Rules 1969, the judgment debtor objected to the validity of the bankruptcy petition contending that the verifying affidavit in support, being attested by a justice of the peace in Sabah, was defective.

D *High Court*

In the High Court, the learned trial judge overruled the objection holding that a justice of the peace in Sabah, being clothed with the power to administer oaths under s 128(a) of the Bankruptcy Act 1967 ('Bankruptcy Act'), was competent to attest the affidavit verifying the bankruptcy petition (see [1994] 3 MLJ 261). In so deciding, the learned trial judge relied on s 4(1) of the Justices of the Peace Ordinance 1961, reg 2 of the Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990, s 79 of the Subordinate Courts Act, 1948 and the Interpretation Acts 1948 and 1967.

Against the decision of the learned trial judge, the judgment debtor appealed to the Court of Appeal.

Court of Appeal

The Court of Appeal agreed with the decision of the learned trial judge and dismissed the appeal with costs (see [1996] 3 MLJ 449). On the point in issue, the Court of Appeal said:

The effect of reg 2 of the Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990 is that in Sabah every Justice of the Peace 'shall be authorized and is required to administer oaths under any written law ... as though he were a Second Class Magistrate'. 'Any written law' must in our view include the Bankruptcy Act.

Federal Court

Before us, counsel for the judgment debtor argued that a justice of the peace in Sabah could not be equated to a magistrate under s 128(a) of the Bankruptcy Act and did not come under the deeming provisions of reg 2 of the Subordinate (Powers of Justices of the Peace) (Sabah) Regulations 1990.

Section 128(a) of the Bankruptcy Act enacts:

Subject to general rules made by the Minister, any affidavit may be used in a bankruptcy court if it is sworn —

- (a) in Malaysia or in the Republic of Singapore before any person authorized to administer oaths in the High Court or any Magistrate; ...

And, reg 2 of the Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990 provides:

- (2) Every Justice of the Peace is authorized and required —

- (a) to administer oaths and affirmations;
(b) to make and receive statutory declarations; and
(c) to attest signatures,

under any written law or when otherwise required to do so as though such Justice of the Peace were a Second Class Magistrate.

For the judgment debtor, counsel further contended that the words 'under any written law' in the said reg 2 did not apply to s 128(a) of the Bankruptcy Act and therefore a justice of the peace in Sabah could not come under the said section. As for the phrase 'or when otherwise required to do so ...' in the said reg 2, counsel argued that a Justice of the Peace in Sabah could not bring himself within that phrase because the said s 128(a) did not specifically require him to administer an affidavit verifying a bankruptcy petition. He also submitted that the deeming provisions in the said reg 2 could not apply to the word 'magistrate' in the said s 128(a) unless there was an express provision in the Bankruptcy Act or in the rules made thereunder allowing the deeming provisions to operate. Counsel further stressed a Justice of the Peace in Sabah is not a magistrate under s 79(2) of the Subordinate Courts Act 1948.

In reply, counsel for the petitioning creditor submitted that although s 128(a) of the Bankruptcy Act did not expressly include a Justice of the Peace in Sabah, it did not expressly exclude him or her either. He referred to the meaning attributed to the word 'magistrate' in s 3 of the Interpretation Acts 1948 and 1967 and contended that it included a second class magistrate. He therefore submitted that, for the purpose of administering oaths and affirmations, a Justice of the Peace in Sabah was also a magistrate under s 128(a) of the Bankruptcy Act.

Admittedly, s 128(a) of the Bankruptcy Act does not expressly include a justice of peace in Sabah (or, for that matter, a justice of the peace generally), nor could a justice of the peace in Sabah, as such, come under the phrase 'person authorized to administer oaths in the High Court', in the said s 128(a), and the word 'magistrate' is not defined in the Bankruptcy Act. However, it may be noted that the said s 128 begins with the words 'Subject to general rules made by the Minister', and s 3 of the Interpretation Acts 1948 and 1967 defines the word 'magistrate' as:

a magistrate appointed under any written law providing for the appointment of magistrates.

The written law providing for appointment of magistrates is to found in ss 78 and 79 of the Subordinate Courts Act 1948. More particularly,

A s 79(2) thereof which provides for the appointment of second class magistrates reads as follows:

- (2) The State Authority may appoint any fit and proper person to be a Second Class Magistrate in and for the State.

B Therefore, the word 'Magistrate' in s 128(a) of the Bankruptcy Acts includes a second class magistrate.

Now, s 99(2) of the Subordinate Courts Act 1948 confers powers on Justices of the Peace in Sabah. It reads:

- C (2) Justices of the Peace in Sabah shall have and shall exercise and perform such powers and duties as may be conferred or imposed upon them by any written law. They shall also have such other powers and duties as the Minister may by regulations confer or impose upon them and the Minister may confer or impose the said powers and duties upon all or any of the Justices of the Peace.

D By virtue of the above s 99(2) of the Subordinate Courts Act 1948, the Minister had made the Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990. Regulation 2 of this 1990 regulations has been set out in the earlier part of this judgment. In the context of this appeal, the effect of the said reg 2, briefly stated, is to authorize and require every justice of the peace in Sabah to administer oaths and affirmations and to attest signatures under any written law as though he or she were a second class magistrate.

E Hence, reading s 128(a) of the Bankruptcy Act together with the meaning of the word 'magistrate' as defined in s 3 of the Interpretation Acts 1948 and 1967, s 79(2) of the Subordinate Courts Act 1948, and reg 2 of the Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990, we come to the conclusion that a justice of the peace in Sabah is competent to attest an affidavit in bankruptcy petition, more particularly, an affidavit verifying a bankruptcy petition. In other words, the question posed for consideration in this appeal must be answered in the affirmative.

F For the above reasons, the appeal is dismissed with costs to the petitioning creditor/respondent, such costs be taxed, if not agreed. Deposit to account of payment of the costs.

G Since, the bankruptcy petition had already been struck out for reasons which are immaterial to this appeal and therefore unnecessary to be mentioned here, we make no order as to the validity of the said petition. Furthermore, since parties in Appeals No 02-18-1996 (S) and No 02-19-1996 (S) had agreed to be bound by the decision herein, those two appeals are likewise dismissed with such consequential orders as to costs and deposits as we have made in this appeal.

H *Appeal dismissed with costs.*